FILE COPY

FILED
AUG 22 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

v.

TOM C. CLARK, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

JACK WASSERMAN,
IRVING JAFFE,
501 13th St., N. W.,
Washington 4, D. C.,
Attorneys for Petitioner.

WILLIAM MASLOW,
ABRAM ORLOW,
Of Counsel.

INDEX

	Page
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	5
The Opinion Below	6
Reasons for Granting the Writ	7
Argument	9
Conclusion	22

CITATIONS

Cases:

Baumgartner v. *United States*, 322 U. S. 665 (1944)	10
Camardo v. *Tillinghast*, 29 F. (2d) 527 (C.C.A. 1)	15
Collins v. *Loisel*, 262 U. S. 425 (1923)	6
Collingswood v. *Pace*, 1 Vent 413, 420, 429; 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664)	10
Colonial Hardwood Floor Co. v. *International Union*, 76 F. Supp. 493 (D. Md. 1948)	21
Dos Reis v. *Nicolls*, 161 F. (2d) 860 (C.C.A. 1, 1947)	19
Elk v. *Wilkins*, 112 U. S. 94, 101 (1884)	10
In re Gogal, 75 F. Supp. 268 (W. D. Pa. 1947)	19
Ex parte Grossman, 267 U. S. 87, 108-109	11
Haaland v. *Attorney General*, 42 F. Supp. 13, 20 (D. Md. 1941)	15
Hanover National Bank v. *Moyses*, 186 U. S. 181	13
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79 (1911)	21
Luria v. *United States*, 231 U. S. 9, 22 (1913)	10
Mackenzie v. *Hare*, 239 U. S. 299 (1915)	6, 18, 19
Matter of Alvarado (Decision of Board of Immigration Appeals, File No. 56158/416, approved by the Attorney General, June 6, 1945)	18
Ohio Bell Tel. Co. v. *Commission*, 301 U. S. 292, 301 (1937)	21
Osborn v. *United States Bank*, 22 U. S. 738, 827 (1824)	9, 14
Perkins v. *Elg*, 307 U. S. 325 (1939)	19
Regina v. *Manning*, 2 Car. & K. 891, 175 Eng. Rep. 372, 378 (Ex. Ch. 1849)	10

Page

Schioler v. *United States*, 75 F. Supp. 353 (N. D. Ill. 1948) 19
Schneiderman v. *United States*, 320 U. S. 118 (1943) 10
Shaufus v. *Attorney General*, 45 F. Supp. 61 (D. C. Md. 1942) 18
In re Skoglund, 46 F. Supp. 434 (D. C. Minn. 1942) 18
Terrace v. *Thompson*, 263 U. S. 197 (1923) 19
U. S. ex rel. Lapides v. *Watkins*, 165 F. (2d) 397 (C.C.A. 2d, 1948) 6, 14
U. S. v. *Petrillo*, 332 U. S. 1 21
Wong Doo v. *United States*, 265 U. S. 293 (1924) 6
Ex parte Woo Wah Ning, 67 F. Supp. 56 (D. C. Wash. 1946) 14

Constitution and Statutes:

Fifth Amendment 2, 21
Article I, Section 8, Clause 4 ..... 2, 10
Article II, Section 1, Clause 5 ..... 2, 10
Revised Statutes, Section 2000 12
Administrative Procedure Act, Sec. 5 (60 Stat. 238; 5 U.S.C.A. 1005 14

Nationality Act of 1940 (54 Stat. 1170, et seq., 8 U.S.C.A. 804, 805, 806, 903):

Sec. 337(c) 16
Sec. 404 ..... 2, 3, 5
Sec. 404(a) and (b) 3, 17
Sec. 404(c) 3, 5, 6, 13, 14, 16, 17, 18, 19
Sec. 405 ..... 3, 8, 18
Sec. 406 ..... 3, 4, 8, 18
Sec. 503 6

Miscellaneous:

III American State Papers on Foreign Relations 454 11
Blackstone Commentaries, Book I, Ch. 10 10
Coke on Littleton, fols. 8a, 129a 10
Farrand, Records of the Federal Convention of 1787 13
3 Hackworth Digest of International Law, 294 et seq. (1942) 15

Page
Hearings on H.R. 6127 and H.R. 9980, 76th Congress, 1st Session 15, 16
Konvitz, The Alien and the Asiatic in American Law (1946), Chapter 4 10
Moore's International Law Digest, Vol. III 12, 13
National Archives XI, 94-95 11
9 Op. Attorney General 360 12
14 Op. Attorney General 295 14
President's Message on the Codification of the Nationality Laws of the United States (76th Cong. 1st Session) 15, 16
Report 352 of Senate Subcommittee on Immigration on S. 5118, 80th Congress, 1st Session 20
Report on "Involuntary Loss of American Citizenship" by Special Committee of the National Council on Naturalization and Citizenship, March, 1947 ..... 19, 20
V Richardson's Messages 641 12
State Papers XLVII, 1241-1243; LII, 1331 ..... 11, 12
Tsiang, The Question of Expatriation in America Prior to 1907:
pp. 18-24 11
pp. 102-103, p. 108 ..... 14, 15
56 Yale Law Journal 700, 701 (1947) 14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No.

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

The Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 13) affirming an order of the United States District Court for the District of Columbia (R. 7) dismissing the complaint and denying petitioner's motion for summary judgment.

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether petitioner may be deprived of his citizenship acquired in 1928 by naturalization on the basis of a statute (54 Stat. 1170, 8 U. S. C. 804) enacted in 1940 which discriminates between native born and naturalized citizens by providing for the loss of citizenship solely on the part of certain naturalized citizens by residence abroad.

2. Whether the aforesaid statute (The Nationality Act of 1940) arbitrarily discriminates between native born and naturalized citizens and between naturalized citizens themselves in violation of the Fifth Amendment.

3. Whether petitioner can be expatriated by residence abroad during wartime when war and shipping conditions prevented his return or whether war and factors beyond his control toll the statute.

4. Whether petitioner has been deprived of his citizenship in violation of the Fifth Amendment.

Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 4

"The Congress shall have power . . . to establish a uniform rule of naturalization.

Article II, Section 1, Clause 5

"No person except a natural born citizen . . . shall be eligible to the office of President."

Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Section 404 of the Nationality Act of 1940 (54 Stat. 1170, 8 U. S. C. A. 804) [1] provides:

> "A person who has become a national by naturalization shall lose his nationality by:
>
> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in Section 406 hereof.
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof."

Certain exceptions are recognized by Sections 405 and 406 of the Nationality Act of 1940, which provide as follows:

> "*Section 405.* Section 404 shall have no application to a person:
>
> (a) Who resides abroad in the employment and under the orders of the Government of the United States;
>
> (b) Who is receiving compensation from the Government of the United States and residing abroad on account of disability incurred in its service.

---

[1] By the terms of Section 409 of the Nationality Act of 1940 as amended (59 Stat. 544) the effective date of loss of citizenship under Section 404 of the Act was postponed until October 14, 1946. The effective date was originally one year from the date of the approval of the Act (54 Stat. 1171). It was extended on October 16, 1941 (55 Stat. 743), on October 9, 1942 (56 Stat. 779), on September 27, 1944 (58 Stat. 747), and finally on October 11, 1945 (59 Stat. 544), so that the Section 404 became effective six years from the date of approval of the Act. Thus although under 404(a) and (b) longer extensions were granted, under 404(c) the extension amounted only to one year.

Section 406. Subsections (b) and (c) of section 404 shall have no application to a person:

(a) Who shall have resided in the United States not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty-five years when the foreign residence is established.

(b) Who is residing abroad upon the date of the approval of this Act, or who is thereafter sent abroad, and resides abroad temporarily solely or principally to represent a bona fide American educational, scientific, philanthropic, religious, commercial, financial, or business organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(c) Who is residing abroad on account of ill health;

(d) Who is residing abroad for the purpose of pursuing studies of a specialized character or attending an institution of learning of a grade above that of a preparatory school, provided that such residence does not exceed five years;

(e) Who is the wife, husband, or child under twenty-one years of age of, and is residing abroad for the purpose of being with, an American citizen spouse or parent who is residing abroad for one of the objects or causes specified in section 405 or subsections (a), (b), (c), or (d) hereof;

(f) Who was born in the United States or one of its outlying possessions, who originally had American nationality, and who, after having lost such nationality through marriage to an alien, reacquired it.

(g) Who is the wife, husband, or child under twenty-one years of age of, and is residing abroad for the purpose of being with a spouse or parent who is an American national by birth and such spouse or parent during minority for a period or periods totaling ten years has resided in the United States.

(h) Who is a veteran of the Spanish-American War, or of the World War, his wife, minor children, or dependent parents."

Public Law 776-80th Congress.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Organic Act of Puerto Rico (39 Stat. 951) is amended by inserting the following new section:

'*Section 5b.* Section 404(c) of the Nationality Act of 1940 (U. S. C., title 8, sec. 804(c)), shall not be applicable to persons who acquired citizenship under the provisions of sections 5 and 5a of this Act.' This amendment to be retroactive to October 13, 1945.

Approved June 25, 1948."

Statement

In his complaint (R. 1) petitioner alleges that he was born in Austria, that he entered the United States in 1922 and was naturalized as a citizen of the United States on June 27, 1928. Except for three temporary absences appellant resided in the United States until 1934. From 1934 until 1947 appellant remained in Palestine. On July 3, 1947 petitioner arrived in the United States and on July 8, 1947 he was excluded on the ground that he had expatriated himself by reason of residence abroad of more than five years under Section 404 of the Nationality Act of 1940 as amended (8 U. S. C. A. 804, 809; 54 Stat. 1170, 1171), and on the further grounds that he had become an alien and was not in possession of a valid visa.

Petitioner alleges that the statutory limitation restricting residence abroad to five years on penalty of loss of citizenship was enacted subsequent to his naturalization, that it has been interpreted to apply retroactively and that

native born citizens are not subject to the same statutory limitation. He also alleges that he was not obliged to return to the United States on or before October 14, 1946 in order to retain his citizenship (R. 4).

The complaint further sets forth that on August 15, 1947 appellant applied for a writ of habeas corpus in the Southern District of New York which alleged that the Immigration Service had no authority to detain him pending a judicial determination of his right to enter as a citizen. On February 6, 1948 the Circuit Court of Appeals for the Second Circuit denied this writ without deciding "what effect if any such denial had upon the plaintiff's right to sue under 54 Stat. 1171, 8 U. S. C. A. 903".[2]

Petitioner in the present action seeks a judgment declaring that he is a citizen, that Section 404(c) of the Nationality Act is inapplicable to him and that said Section is unconstitutional.

Opinion Below

The Court of Appeals affirmed the order of the District Court with one judge dissenting (R. 8-12). The opinion is not yet reported. The majority opinion accounted for the discrimination against naturalized citizens on the ground that it was necessary "to lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens." It relied upon *Mackenzie* v. *Hare*, 239 U. S. 299 (1915) where expatriation resulted on the part of a woman by marriage to an alien and concluded that "In view of this decision, supporting classification as between native born citizens, we cannot doubt that for a simi-

---

[2] *U. S. ex rel. Lapides v. Watkins*, 165 F. (2d) 397 (C. C. A. 2d 1948). This opinion was annexed to appellant's motion for summary judgment. It is clear that this prior habeas corpus action is not res judicata on the issues raised herein. *Wong Doo v. United States*, 265 U. S. 293 (1924), *Collins v. Loisel*, 262 U. S. 425 (1923). In any event, as note[2] in the dissenting opinion below, res judicata was neither urged nor pleaded by the government.

lar purpose Congress has the power to distinguish between native born and naturalized citizens." The majority found that petitioner "reveals no arbitrary application of the statute as to him" in view of his failure to return within the permitted time.

The dissenting judge was of the opinion that the statute was unconstitutional on two grounds—because of the discrimination against naturalized citizens and because it arbitrarily expatriated petitioner. He concluded that the Constitution did not authorize Congress "to deprive citizens either at or after naturalization of liberties that other citizens enjoy . . . Together with the immigration law the Nationality Act makes it in effect a crime punishable by banishment, which may well be called cruel and unusual for some citizens but not for others to live five years abroad. Even complete inability, from whatever cause, to return to the United States during the five year period gives no immunity and a considerable number of foreign born Americans have therefore been banished by circumstances over which they had no control."

Reasons for Granting the Writ

1. This case for the first time squarely raises the important question of federal law whether Congress may enact legislation discriminating between native born and naturalized citizens. The outcome of this litigation will directly affect the American citizenship of several thousand persons stranded abroad during World War II. It will define the rights of some six and a half million naturalized citizens. The Supreme Court has repeatedly asserted that except with regard to the presidency, naturalized citizens and native born stand on the same footing. These assertions are supported by a reading of the Constitution in the light of legal concepts and principles prevailing at the time of its adoption. The majority opinion below is in direct conflict

with the Constitution and with these repeated Supreme Court expressions.

2. The penalty of expatriation by five years residence abroad does not apply to native-born Americans. It likewise does not apply to certain naturalized citizens including those over 65 who resided in the United States for twenty-five years, those representing American educational or business firms, veterans of World War I and the Spanish American War, those born in Puerto Rico and others (8 U. S. C. 805, 806). This distinction between naturalized citizens was not considered by the court below and cannot be justified "by a policy to avoid embarrassment and controversy with foreign governments." Such policy would apply to all naturalized citizens and to native born Americans of dual nationality. The distinction cannot be supported nor can the reasoning of the court below justify the differentiation between native born and naturalized citizens on the one hand and between classes of naturalized citizens on the other. It is the contention of petitioner that the classifications made by the Act are arbitrary and unconstitutional.

3. The petitioner alleges that he was not required to return to the United States on October 14, 1946 as required by the Act. (Par. 20 of the complaint, R. 4). Under this allegation he should have been permitted to establish and the court could have taken judicial notice of the fact that from 1941 to 1946 he was unable to return because of the war and lack of shipping conditions. Administratively, the government has determined that such factors do not toll the statute. Deprivation of citizenship under such an interpretation results in involuntary expatriation and is arbitrary and unconstitutional.

ARGUMENT

POINT I

There can be no valid classification between naturalized and native born citizens except those recognized by the Constitution.

The issue presented by the complaint is whether Congress can under the Constitution provide a ground for expatriation which applies only to naturalized citizens.

1. The Supreme Court has on several occasions stated that except with regard to the Presidency, a naturalized citizen stands on equal footing with a native born.

> "A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. *The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up,* and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. *He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.*" (Italics supplied). *Chief Justice Marshall* in *Osborn* v. *United States Bank*, 22 U. S. 738, 827 (1824).

> "The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which 'no person, except a natural born citizen, or a citizen of the United States at the time of the Adoption of this Con-

stitution, shall be eligible to the office of President'; and 'the Congress shall have power to establish an uniform rule of naturalization.' Constitution, Art. 2, Sect. 1; Art. 1, Sect. 8." *Justice Gray* in *Elk v. Wilkins*, 112 U. S. 94, 101 (1884).

"Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency. Minor *v.* Happersett, 21 Wall 162, 165; Elk *v.* Wilkins, 112 U. S. 94, 101; Osborne *v.* Bank, 9 Wheat 738, 827." *Justice Van Devanter* in *Luria v. United States*, 231 U. S. 9, 22 (1913).

" 'Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects save that of eligibility to the Presidency.' Luria *v.* United States, 231 U. S. 9, 22." *Justice Frankfurter* in *Baumgartner v. United States*, 322 U. S. 665, 673 (1944).

"It may be doubted that the framers of the Constitution intended to create two classes of citizens, one free and independent, one haltered with a lifetime string tied to its status." *Justice Rutledge*, concurring, *Schneiderman v. United States*, 320 U. S. 118, 167 (1943).

See also: *Konvitz, The Alien and the Asiatic in American Law* (1946) Chapter 4, The Right To Remain a Citizen.

2. Under English law, naturalization conferred all the rights of the native born upon an alien except eligibility for certain public offices.

Coke on Littleton, fols. 8a, 129a;

Blackstone, *Commentaries*, Book I, ch. 10;

Regina v. *Manning*, 2 Car. & K. 891, 175 Eng. Rep. 372, 378 (Ex. Ch. 1849);

Collingswood v. *Pace*, 1 Vent 413, 420, 429, 86 Eng. Rep. 262, 266-267, 272 (Ex. Ch. 1664).

The Constitution should be interpreted with this background, *Ex parte Grossman*, 267 U. S. 87, 108-109 (1925), as well as in the light of contemporaneous construction. Naturalization was considered vital to the success of our country in its early days as a means of encouraging immigration and an unequal status by naturalized citizens was deemed to discourage immigration. See *Tsiang, The Question of Expatriation in America prior to 1907* (1942) at pp. 18-24. In our foreign relations from the War of 1812 and for almost one hundred years thereafter we consistently asserted the equality of native born and naturalized citizens in our foreign relations.

> "It is impossible for the United States to discriminate between their native and naturalized citizens . . ." (Monroe to Foster, British Minister at Washington, May 30, 1812) III American State Papers on Foreign Relations 454.
>
> "By our law, all the rights of natives are given to naturalized citizens" (President Madison to Binns, February 11, 1813; II Letters and Other Writings of James Madison 558).
>
> ". . . When the process of naturalization is once performed in the United States, the rights of the adopted citizen, so far as foreign nations are concerned, are deemed and held to be everywhere, on the ocean and on the land, the same as those of a native-born citizen." (Clay to Gallatin, June 19, 1826, Department of State, M.S., "Instructions, Great Britain," National Archives XI, 94-95).
>
> "Our obligation to protect both these classes (naturalized and native Americans) is in all respects equal. We can recognize no difference between the one and the other, nor can we permit this to be done by any foreign government, without protesting and remonstrating against it in the strongest terms." (Secretary of State Buchanan to Bancroft, December 18, 1848, State Papers XLVII, 1241-1243).

"The moment a foreigner becomes naturalized, his allegiance to his native country is severed forever . . . Should he return to his native country, he returns as an American citizen, and in no other character." (Cass to Wright, July 8, 1859, State Papers LII, 1331 Ex. Doc. 38, 36 Cong. 1st Sess. 132).

"Our Government is bound to protect the rights of our naturalized citizens everywhere to the same extent as though they had drawn their first breath in this country. We can recognize no distinction between our native and naturalized citizens." (President Buchanan, Annual Message of December 3, 1860; V Richardson's Messages 641.)

"All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native born citizens." Law of July 28, 1868 (Sec. 2000, Rev. Stat.).

"A native and naturalized American . . . may go forth with equal security over every sea and through every land under heaven including the country in which the latter was born. They are both American citizens and their exclusive allegiance is due to the Government of the United States." 9 Op. Atty Gen. 360 (1858).

"When an alien . . . is found to be of good moral character, he is admitted to such citizenship; and is thenceforth clothed and invested with the same rights and privileges that pertain to native citizens of the country, and entitled to the same degree of protection, whether abroad or at home." Secretary of State Frelinghuysen to Mr. Cramer, July 28, 1883, III Moore's International Law Digest 583-4.

"Mere residence abroad is not, however, construed as an abandonment of allegiance." Secretary of State Bayard to Col. Frey, May 20, 1887, III Moore's International Law Digest 584.

"Our statutes do not allow this government to admit any distinction between the treatment of native and naturalized Americans abroad. . . ." Pres. McKinley, Annual Message, For. Rel. 1899, XXXI; III Moore's International Law Digest 586.

3. The framers of the Constitution rejected a draft to empower Congress to regulate naturalization, which Madison pointed out would have given Congress the power to legislate respecting the enjoyment by the naturalized of the various privileges of citizenship. 2 *Farrand,* Records of the Federal Convention of 1787, 144, 167, 235; 4 *Farrand,* 45. Thus the narrow statement of power ultimately incorporated in the Constitution and the specification therein of a distinction between naturalized and native-born with respect to the Presidency, reflect a deliberate determination not to leave to Congress the power to regulate the status, rights and privileges of the naturalized. (See: *Hanover National Bank* v. *Moyses,* 186 U. S. 181, 187.)

The majority below was concerned with lessening friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens. It was upon such disputes that our republic was established. The only way to avoid them is to eliminate naturalization. Moreover, it will be noted that not a single reference by the majority indicates that we had any friction with foreign governments other than those claiming allegiance from the naturalized citizen, *i.e.,* his country of origin. Petitioner did not return to his native land but went to a third country.

If Section 404(c) of the Nationality Act of 1940 is sustained, then Congress (apart from the Constitution) may create classes of American citizenship; one class which will be free and untrammeled and another class restricted in its right to travel and remain abroad. If this power is upheld, then Congress may create a second class citizenship. A naturalized citizen "is distinguishable in nothing from a

native born citizen, except so far as the Constitution makes the distinction." Chief Justice Marshall in *Osborn* v. *United States Bank, supra.* The Constitution permits a distinction only with regard to the presidency. Congress, therefore, has no constitutional power to make the classification created by Section 404(c) of the Nationality Act of 1940.

Point II

Assuming arguendo that there may be a classification between citizens, the classification is arbitrary and unconstitutional.

(A) History of 404 (c) of Nationality Act of 1940.

(1) *Prior to 1907.* Mere residence abroad by a naturalized citizen did not result in expatriation or in any presumption of loss of diplomatic protection. 14 *Op. Attorney General 295; Tsiang, The Question of Expatriation in America prior to 1907* (Johns Hopkins University Studies—1942, pp. 102-103).

(2) *Between 1907 and 1941.* The prevailing view under the 1907 Expatriation Act was that residence abroad by a naturalized citizen resulted in a *presumption* of loss of diplomatic protection—not loss of citizenship.[3]

---

[3] In the administrative proceedings herein no claim was made of loss of citizenship under the 1907 Act. See *U. S. ex rel. Lapides v. Watkins, supra,* and paragraph 8 of complaint (R. 2). This issue was raised in the District Court for the first time. It is submitted that the government may not raise the issue in the light of its failure to do so administratively. *Ex parte Woo Wah Ning,* 67 F. Supp. 56, (D. C. Wash. 1946). Under Section 5 of the Administrative Procedure Act, (60 Stat. 238; 5 U. S. C. A. 1005) appellant was entitled to timely notice of the issues of law and fact in his exclusion proceeding. 56 Yale Law Journal 700, 701 (1947).

In *Tsiang, The Question of Expatriation in America Prior to 1907* (p. 108), it is stated, with reference to the 1907 presumption that its

> "net effect was simply the withdrawal by the State Department of American protection."

This prevailing view is expressed in the President's message on the "Codification of the Nationality Laws of the United States" (76th Cong. 1st Session). In Part I, page 70, it is stated that the 1907 Act [4]:

> ". . . as construed by the courts, the presumption of loss of citizenship arising under its terms never becomes final, regardless of the length and cause of the foreign residence (Nurge v. Miller, 286 Fed. 982; Miller v. Sinjen, 289 Fed. 388; United States v. Eliasen, 11 F. (2d) 785; Camardo v. Tillinghast, 29 F. (2d) 527). In these cases the courts adopted the view which had been expressed by Attorney General Wickersham in an opinion of December 1, 1910 (28 Op. Atty. Gen. 504), that *the presumption relates to loss of the right of diplomatic protection as a citizen, rather than loss of citizenship itself.*" (Italics supplied.)
>
> See also *Camardo v. Tillinghast,* 29 F. (2d) 527 (C. C. A. 1, 1928);
>
> *Haaland v. Attorney General,* 42 F. Supp. 13, 20 (D. Md. 1941).

This view is that expressed by the Department of State.

3 *Hackworth Digest of International Law* 294 et seq. (1942);

See also: Hearings on H. R. 6127, 9980 (76th Cong. 1st Sess.) p. 136.

Thus there was no provision for loss of citizenship by reason of foreign residence at the time the plaintiff departed from the United States in 1934.

---

[4] Reprinted at page 494 of the Hearings on H. R. 6127 and H. R. 9980, 76th Congress, 1st Sess.

The Codifiers who proposed the Nationality Act of 1940 merely suggested that there was a basis for providing that residence by a naturalized citizen *in his country of origin* should result in expatriation. It was recognized that such provision would be "somewhat drastic." They stated (President's Message, *supra*, Part I, p. 71, 75):

> "While the provision of subsection (b) for loss of nationality in cases of naturalized citizens who reside for three years in their countries of origin may appear to be somewhat drastic, it is believed to be fully warranted. . . . As to the second question, it was concluded that the provisions of subsection (b) should be limited to cover naturalized citizens residing in their countries of origin. Needless to say, naturalized citizens who resume residence in foreign lands from which they came are apt to renew old associations and ways of living and thinking and thus become merged in the native population, losing to a degree, if not completely, their American character and feeling. . . . It is believed that cases of naturalized citizens residing in foreign countries other than those from which they came may be disposed of under the provisions of Section 337(c) of the code. . . ."[5]

During the hearings on the Nationality Act, the provisions of Section 404(c) were first suggested. The hearings on H. R. 6127, 9980 (76th Cong. 1st Sess.) pp. 140-141, sets forth the following:

> "MR. REES. In other words, you have done away with the presumption only in cases where a man goes back to his own country?
>
> MR. FLOURNOY. Under this expatriation provision, you mean?
>
> MR. REES. Yes.

---

[5] 337(c) proposed a presumption of fraud in acquiring naturalization where a person became a permanent resident abroad within ten years of naturalization.

MR. FLOURNOY. It is a serious question, and I think the committee and the subcommittee ought to consider whether it would be desirable to put in a provision to cover each person who goes to a third country. The principal cases we have, I may say, are these Zionists. They are principally Russian and German Jews who were naturalized in this country and later went to Palestine. We have other cases, but I mean that there are more of that particular body than in any other category. We have other cases, for instance some German in this country who has gone maybe to South Africa or to one place and another, and perhaps it would be desirable to have in the code a provision for termination of nationality in those cases. I think the thing is worthy of consideration. Maybe some of the representatives of the other departments here would want to express views on this."

• • • • • • •

"MR. REES. We will change it and use 7 years and 10 years.

"MR. FLOURNOY. The cases which cause trouble are the cases where a person settles down in some country. We might say a residence of 7 years would result in a loss of citizenship unless he came under one of these exceptions. Personally, I think it would be reasonable. I do not know why a person who obtained naturalization upon a statement under oath that he intends to reside permanently in the United States should retain his citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases who go back to their native land. There is no question about that."

It will thus be observed that although considerable reflection was given to the provisions of 404(a) and (b), the suggestion for 404(c) was one of those last minute amendments. Finally it should be observed that administratively and judicially it has been held that the Nationality Act is prospective in operation.

Shaufus v. *Attorney General*, 45 F. Supp. 61 (D. C. Md. 1942);

In re Skoglund, 46 F. Supp. 434 (D. C. Minn. 1942).

"Were the expatriation sections retroactive, they could not interfere with or disturb the vested right of citizenship and at the same time be valid under our Constitution." *Matter of Alvarado* (Decision of Board of Immigration Appeals, File No. 56158/416, approved by the Attorney General, June 6, 1945).

Petitioner does not concede that citizens may be classified. Assuming, arguendo, that reasonable classifications may be made, it is submitted that the instant classification is unconstitutional.

(1) Native born citizens of dual nationality, and certain naturalized citizens (8 U. S. C. 805, 806) may remain abroad for fifty years, indefinitely, or from early infancy until they die. No limitation is imposed on their citizenship by mere residence abroad.

(2) Other naturalized citizens like petitioner cannot remain abroad for more than five years.

Friction may and has resulted with foreign governments in all these cases, particularly in the case of native born citizens of dual nationality. It therefore does not furnish a basis for the discrimination. *Mackenzie* v. *Hare*, 239 U. S. 299 (1915) does not sanction such a distinction. The statute involved in that case did not discriminate between native born and naturalized women—it applied to both with equal force. The discrimination based on sex upheld in *Mackenzie* v. *Hare* was merely a judicial recognition of the concept of unity between husband and wife which prevailed at the time. It is doubtful that such a distinction would be recognized today.

It is submitted that the classification created by Section 404(c) of the Nationality Act is unconstitutional and violative of the Fifth Amendment.

Point III

The Act Results in Arbitrary and Unconstitutional Expatriation

The power to naturalize is not the power to expatriate. Congress has the constitutional power to enact naturalization laws. It "is not trammeled and it may grant or withhold the privilege of naturalization upon any grounds or without any reason as it sees fit." *Terrace* v. *Thompson*, 263 U. S. 197, 220 (1923). However, Congress is restricted with reference to depriving persons of their nationality. Citizenship may not be taken away arbitrarily. *Mackenzie* v. *Hare, supra.* Moreover it is to be remembered that the very basis of expatriation is the fact that a person is permitted *voluntarily* to abandon his citizenship. *Perkins* v. *Elg*, 307 U. S. 325 (1939).

Involuntary or arbitrary loss of citizenship is not recognized under our laws or our Constitution.[6]

Under Section 404(c) of the Nationality Act, intervening war, inability to return to the United States because of shipping difficulties, because of illness acquired abroad, or because of inability to leave the foreign country (exit permission from Soviet dominated lands) and the like do not toll the five year period.

In March of 1947 a Special Committee of the National Council on Naturalization and Citizenship published a report on the "Involuntary Loss of American Citizenship." This report was prepared in collaboration with the Department of State and "the sources from which information was obtained were, primarily, American consuls in foreign countries, American social agencies . . . American business organizations having branches or affiliates in foreign coun-

---

[6] *Dos Reis v. Nicolls*, 161 F. (2d) 860 (C. C. A. 1, 1947); *Schioler v. United States*, 75 F. Supp. 353 (N. D. Ill. 1948); *In re Gogal*, 75 F. Supp. 268 (W. D. Pa. 1947); *Mackenzie v. Hare, supra.*

tries, and interested individuals." A copy of this report was presented to the District Court on oral argument below. In part, this report states:

> "Difficulty in obtaining transportation because of lack of space on passenger boats was reported as the factor known to have caused loss of citizenship by consuls in South Africa, Argentina, Portugal, Sweden, Spain, and Italy. A related factor was the high cost of passage from distant points and the inability of some persons to raise the necessary funds within the two-months period before the deadline." . . . (pp. 11-12).
>
> "Delays in dealing with requests for passports and other papers by staffs of Government departments in the United States were alleged to have been responsible for the loss of citizenship in several cases." . . . (p. 14).
>
> "The agencies who reported to your Committee give vivid illustrations of further causes. Some persons did not return on time because of the seaman's strike; some could not return because in countries such as Yugoslavia, Roumania and Russia they were unable to obtain exit permits. The war brought financial stringency to others making it impossible for them to pay their own passage home or to bring their families with them. Others could not return because they could not obtain exit permits or transportation or necessary travel documents. The search for proof of naturalization took time and the preparation of necessary documents was often delayed by congestion in the offices of American government agencies.
>
> "It is clear that through the enactment of our expatriation laws a considerable number of American citizens were unduly deprived of their citizenship, contrary to their own volition, by factors beyond their own control." (p. 16).

As late as the 80th Congress, 1st Session, the Senate Subcommittee on Immigration in a report numbered 352 accompanying S. 5118, recognized that American citizens abroad were unable to return to the United States prior to October

14, 1946 by reason of factors beyond their control. The aforementioned Senate report contains a letter from the Attorney General which likewise recognized that lack of transportation and other factors prevented the return of many naturalized citizens to the United States within the time limitations of the Nationality Act of 1940. In his letter to the Committee, the Attorney General stated:

> "I do not believe that it was the purpose of Section 409 to penalize American citizens who were trying in every way possible to retain their citizenship but who were prevented from doing so by circumstances beyond their control."

The complaint herein alleges that the plaintiff was not required to return to the United States prior to October 14, 1946. The court may take judicial notice of the facts of common knowledge. *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 301 (1937). Thus the fact that War existed and that there was no shipping between the United States and Palestine during the War and for a period after the War should be noted by the court. The facts of which a court should take judicial notice need not even be averred. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79 (1911). Therefore the fact that the plaintiff was unable to return to the United States during the War is a fact of which the court may take judicial notice.

It is therefore submitted that the instant statute is arbitrary, that it results in the involuntary loss of citizenship, and that it is violative of the Fifth Amendment. The motion to dismiss should have been denied[7] and judgment should have been entered for the petitioner.

---

[7] "In a number of recent cases the Supreme Court has pointed out the inadvisability of deciding grave constitutional questions with respect to newly enacted statutes on motions to dismiss and without the benefit of a hearing of the facts of the case. See, for instance, *United States* v. *Petrillo*, 332 U. S. 1, 67 S. Ct. 1538." *Colonial Hardwood Floor Co.* v. *International Union*, 76 F. Supp. 493 (D. Md. 1948).

Conclusion

THEREFORE, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

JACK WASSERMAN,
IRVING JAFFE,
501 13th St., N. W.,
Washington, D. C.,
Attorneys for Petitioner.

WILL MASLOW,
ABRAM ORLOW,
Of Counsel.

(3835)